RAMUTHI A/L SUBRAMANIAM

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KANGAR
DATO' ALAUDDIN BIN DATO' MOHD. SHERIFF J.
[CRIMINAL APPEAL NO.42-7-94]
29 OCTOBER 1994

CRIMINAL LAW: Conviction of an offence under s. 304 of the Penal Code - Appeal against conviction and sentence - Whether the ingredients of the offence were proved by the prosecution - Prosecution relying on circumstantial evidence - Whether prosecution had established a prima facie case against the appellant - Alleged murder weapon not dusted for fingerprints - Clothes worn by appellant not tested for forensic evidence - Whether fatal to prosecution's case.

The appellant was charged for an offence under s. 304 of the Penal Code. At the trial in the Sessions Court, the prosecution relied on circumstantial evidence to prove its case. The appellant was duly convicted and sentenced to five years imprisonment.

On appeal the question that arose was whether the prosecution had successfully proved the three ingredients of the offence under s. 304 of the Penal Code.

Held:

[1] The prosecution had failed to prove the second and third ingredients required under s. 304 of the Penal Code. As such the prosecution had failed to prove its case against the appellant beyond reasonable doubt and it was wrong for the learned Sessions' Court Judge to have called for the defence. Had the learned Sessions' Court Judge properly directed her mind to the law on circumstantial evidence and carefully evaluated the prosecution's evidence, she would certainly have come to a different conclusion.

[2] Based on the authorities cited and the reasons given and given the fact that there were gaps in the prosecution case, it cannot safely be said that the evidence adduced by the prosecution had pointed irresistibly to the conclusion of the guilt of the appellant.

[Appeal allowed. Conviction and sentence set aside].

Cases referred to:
Jayaraman & Ors v. PP [1982] 2 MLJ 306 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Kartar Singh & Anor v. R. [1952] 2 MLJ 85 ***(refd)***
Idris v. PP [1960] MLJ 296 ***(refd)***
Sunny Ang v. PP [1966] 2 MLJ 195 ***(refd)***
Karam Singh v. PP [1967] 2 MLJ 25 ***(refd)***
Chan Chwen King v. PP [1962] MLJ 307 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Khoo Hi Chiang v. PP [1994] 1 MLJ 290 ***(refd)***

Legislation referred to:
Penal Code, s. 304

Other sources referred to:
Ratanlal's The Law of Crimes, 22nd Edn. p. 804

For the appellant - R.C. Murugeson; M/s. R.C. Murugeson & Co.
For the respondent - Khairilaswar, DPP

JUDGMENT

Dato' Alauddin bin Dato' Mohd. Sheriff J:
The appellant was charged before the Sessions Court of an offence under s. 304 of the Penal Code which reads as follows:-

> Bahawa kamu pada 7 Disember 1988 jam lebih kurang 11.30 malam di kelab JKR, Taman Bukit Kaya, Kangar didalam negeri Perlis telah membunuh Hussin bin Megat Putih tanpa niat dengan memukulnya dengan menggunakan sebatang kayu mengkudu. Olih yang demikian kamu telah melakukan satu kesalahan yang bolih dihukum di bawah seksyen 304 Kanun Kesiksaan.

At the close of the hearing the appellant, was convicted and sentenced to 5 years imprisonment under the second limb of s. 304 of the Penal Code.

He now appeals against both conviction and sentence.

The facts of the prosecutions case are as follows:-

The appellant was working as a labourer with the JKR Kangar and lived with his parents at Tok Kandang, Kangar. About 3 months prior to the alleged incident the appellant did not stay with his parents but went and lived with his friend Jayabalan (PW13) at 3½ milestone Jalan Kaki Bukit. The reason for leaving his parents home was that the appellant could not endure the frequent scoldings by his parents over his drinking habit. Whilst staying with Jayabalan the appellant continued drinking and this annoyed Jayabalan. Like his (appellant's) parents, Jayabalan used to scold him frequently over his habitual drinking. As a result on 7 December 1988 at about 4.00 p.m. the appellant packed all his clothings and left Jayabalan's house. Together with him he took his medicine for his sore eyes.

At about 8.00 a.m. on 8 December 1988 as one Khizan (PW6) was on his way to park his car near the JKR Club he was approached by two municipal labourers who informed him that there was a dead body near the door leading to the Club. Having seen the dead body in a pool of blood PW6 then informed the police.

The investigation into the incident was immediately commenced by the I.O., ASP Roslan (SP12) assisted by Chief Inspector Yaakob (SP14). In the course of their investigation the following exhibits were discovered at the scene i.e. an empty liquor bottle, a few shirts and trousers placed in a cupboard. One of the trousers' pockets contained 2 packets of medicine with the name Ramuthi (appellant) written on them. From this information, the police managed to trace the appellant and on 10 December 1988 at about 11.00 a.m. the appellant was arrested at his house at Kampong Tok Kandang by Chief Inspector Yaakob (SP14). At the end of the investigation the appellant was charged at the Sessions Court on 24 December 1988. That was the case for the prosecution.

Before me the conviction was attacked on the following grounds:-

(1) The learned Sessions' Court Judge erred in law and fact in holding that the prosecution had proved a *prima facie* case against the appellant merely on the grounds that there were present the appellants' clothes and medicine (P20A, P21A, P22A and P22B, P32 A & B) in the cupboard in the abandoned JKR Club some considerable distance from the body of the deceased;

(2) The investigation carried out by the police was insufficient and unsatisfactory in that exhibit P11 (the alleged weapon used) was not dusted for fingerprints and the appellants's clothes worn at the material time of the charge were not collected and tested for forensic evidence.

(3) The learned Sessions' Court Judge erred in law and fact when she did not fully consider the appellants' defence. It was also wrong for the learned Judge to have made certain speculations and inferences to the disadvantage of the appellant as there was no such evidence upon which she could have done so.

According to **Ratanlal's The Law of Crimes** 22nd Edition at page 804 the ingredients which have to be proved by the prosecution for an offence under s.304 are:-

(i) The death of the deceased.

(ii) The death is caused by the act of the accused.

(iii) The accused knew that such act was likely to cause death.

There is no doubt that the first ingredient had been successfully proved by the prosecution. The deceased body was found near the JKR Club. The medical evidence established the cause of death as:-

> Pelbagai keretakan di bahagian tengkorak dengan pedahan otak ...Pada pendapat saya, kecederaan demikian mungkin disebabkan penggunaan objek yang tumpul dengan kekuatan terhadap kepala.

With regard to the second ingredient it is obvious from the very outset that the prosecution relied on circumstantial evidence. It cannot be denied that there is no direct evidence whatsoever connecting the appellant to the alleged offence.

There are a number of cases dealing with circumstantial evidence which have been decided by our Courts. Cases like *Jayaraman & Ors v. PP* [1982] 2 MLJ 306; *Chang Kim Siong v. PP* [1968] 1 MLJ 36; *Kartar Singh & Anor v. R.* [1952] 2 MLJ 85; *Idris v. PP* [1960] MLJ 296; *Sunny Ang v. PP* [1966] 2 MLJ 195; *Karam Singh v. PP* [1967] 2 MLJ 25; *Chan Chwen King v. PP* (1962) MLJ 307, are just a few of them.

In *Chang Kim Siong v. PP* [1968] 1 MLJ 36 the appellant appealed against his conviction for murder. The evidence against the appellant was circumstantial and Pike C.J. (Borneo) in giving the judgment of the Federal Court allowing the appeal said:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

In *Chan Chwen King v. PP* [1962] MLJ 307 the appellant was convicted of the murder of a woman and her child. The evidence against the appellant was entirely circumstantial and this was one of the grounds of appeal. Thomson CJ, as he then was, in giving the judgment of the Court of Appeal said:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands

when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

In the case of *Karam Singh v. PP* [1967] 1 MLJ 25, the appellant appealed against his conviction for murder. There was no eyewitness of the actual attack on the deceased (as in our present case); the prosecution case was based entirely on circumstantial evidence. Ong Hock Thye F.J. as he then was, in giving the judgment of the Federal Court said:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

The difference between the effect of direct and circumstantial evidence was pointed out in the Singapore case of *Kartar Singh & Anor. v. R.* [1952] MLJ 85. The appellants had been convicted of the offence of culpable homicide not amounting to murder. Murray - Aynsley J. in giving the judgment of the Court of Criminal Appeal allowing the appeal said:

> ...
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> Here it is necessary to distinguish between the effect of direct and circumstantial evidence. Where there is direct evidence, however slight, the jury are entitled to accept it and the case should be left to them to decide.
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> In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If there is anything less than this it is no case at all.

Coming back to the present case the only circumstantial evidence produced against the appellant to connect him to the alleged offence was his clothings and medicine and also the empty liquor bottle bearing the brand name 'Orang Tua'. That was all the evidence the prosecution had against the appellant. There was absolutely no other evidence apart from this either direct or circumstantial. Based on this alone the prosecution alleged the appellant committed the offence.

The prosecution sought to introduce evidence of addiction to alcohol by the appellant to connect him to the empty liquor bottle found at the scene of the crime. Although the appellant never denied he was an alcoholic, he categorically stated that he only took the brand 'Maharajah' and not 'Orang Tua'. Neither the empty bottle nor the alleged weapon used (P11) were dusted for fingerprints. The reason given by the prosecution was that it was difficult to lift fingerprints from these exhibits. To my mind these are vital exhibits to the prosecution. The fact that no attempts were made to dust for fingerprints from these exhibits showed that the investigation was carried out in a shoddy manner. If in fact, these exhibits were dusted for fingerprints it could well show that the appellant was not the culprit. It seems to me that the prosecution was intent to gather information that would incriminate but exclude evidence which would exonerate the appellant from the crime.

Again, there was evidence by the medical officer (PW1) to the effect that if any person had caused injuries to the deceased using P11 he would most likely have been spattered with the blood of the deceased because of the profuse bleeding of the deceased. This fact could have been confirmed, if the prosecution had taken the appellant's clothings worn by him on the day of the alleged crime and sent them for forensic examination. Unfortunately this too was not done. This again revealed the lackadaisical attitude of the police in carrying out their investigation. The

prosecution's short answer to this was that the clothings could have been destroyed. But the fact remains that no attempts were made to recover them.

It must also be borne in mind that the appellant's clothes and medicine were found in the cupboard which was some distance away from where the deceased body was found. From the photographs it became evidently clear that the scene of the crime was an abandoned clubhouse which was accessible to all and sundry. As such, in the absence of any direct evidence it would be fallacious to even suggest that the appellant had anything to do with the crime.

According to the I.O. and ASP Yaakob when they saw the body, the deceased was dressed in lady's attire with make up on his face. This would only suggest that the deceased was a homosexual. This fact was however confirmed by the evidence of PW7 and PW3. This being the case it could well be that the deceased had gone to the abandoned club to meet his other homosexual friends. As I have said earlier the Club was accessible to anyone and under such circumstances it is not unreasonable to suggest that such places are frequented by either homosexuals or transvestites. Therefore, in the absence of any direct evidence connecting the appellant to the crime it is reasonable to suggest that the offence could have been committed by someone else other than the appellant.

The prosecution in their desperate attempt to connect the appellant to the alleged crime sought to introduce the cautioned statement of the appellant. However at the end of a trial within a trial the cautioned statement was rightly rejected as being involuntarily made. There was no other evidence on which the prosecution could rely except the appellant's clothings and medicine.

The Supreme Court in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 290 had this to say:

> It follows, therefore, that in this country, at the close of the prosecution's case, the question for decision by the trial Judge, (except when he is sitting with a jury), is not just a hypothetical question of law but an actual and quite different question of fact illustrated by the numerous Malaysian and Singaporean cases decided before our Courts were infected by the *Haw Tua Tau* virus.
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> Consequently, the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

Based on the above I find that the prosecution had failed to prove the second and third ingredients required under s.304 of the Penal Code. As such the prosecution had failed to prove its case against the appellant beyond all reasonable doubt and it was wrong for the learned Sessions' Court Judge to have called for the defence.

Had the learned Sessions' Court Judge properly directed her mind to the law on circumstantial evidence and carefully evaluated the prosecution's evidence she would certainly have come to a different conclusion.

Based on the authorities cited and reasons given above I cannot safely say that the evidence adduced by the prosecution had pointed irresistably to the conclusion of the guilt of the appellant. There certainly are gaps in the prosecution's case.

As I have already decided that the prosecution had failed to prove a *prima facie* case against the appellant, I do not propose to consider the third ground of appeal which is related to the appellant's defence.

I would allow this appeal and set aside the conviction and sentence.